



FEDERAL ELECTION COMMISSION  
WASHINGTON, D C 20463

Charles A. Blanchard  
Perkins, Coie, Brown, and Bain  
2901 N. Central Avenue  
Suite 2000  
Phoenix, AZ 85012-2788

NOV - 5 2007

Re: MUR 5841  
Harry Mitchell for Congress and John  
Bebbling, in his official capacity  
as treasurer

Dear Mr. Blanchard:

On October 17, 2006, the Federal Election Commission notified your clients of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended. On October 29, 2007, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe Harry Mitchell for Congress and John Bebbeling, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a and 434(b). The Commission also dismissed the alleged violation of 2 U.S.C. § 441d. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Kamau Philbert, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Shonkwiler".

Mark Shonkwiler  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Arizona Democratic Party a/k/a Arizona MUR: 5841  
State Democratic Central Executive Committee  
and Rick McGuire, in his official capacity as treasurer<sup>1</sup>  
Harry Mitchell for Congress  
and John Bebbling, in his official capacity as treasurer

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by Matt Salmon, Chairman of the Arizona Republican Party. See 2 U.S.C. § 437g(a)(1).

II. FACTUAL SUMMARY

The complaint in this matter involves allegations that the Arizona Democratic Party a/k/a Arizona State Democratic Central Executive Committee and Rick McGuire, in his official capacity as treasurer ("ADP"), violated the Federal Election Campaign Act, as amended ("the Act"). According to the complaint, the ADP sent three mailers during the 2006 election cycle that either promoted Harry Mitchell's candidacy for United States Congress or criticized his opponent, J.D. Hayworth.<sup>2</sup> The complaint alleges that the ADP improperly funded the mailers under the "volunteer activity for party committees" exemption because the "attached commercially produced mail pieces clearly bear commercially printed labels and postage stamps" and therefore do not satisfy the requirements of 2 U.S.C. §§ 431(8)(B)(ix) and (9)(B)(viii) and the corresponding regulations found at 11 C.F.R. §§ 100.87 and 100.147.

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<sup>1</sup> Carter Olson was the treasurer for the ADP until January 30, 2007, when the committee filed an amended Statement of Organization naming Rick McGuire as the new treasurer

<sup>2</sup> The complaint provided copies of the mailers. Two of the mailers appear to consist mostly of snippets of news reports linking Hayworth to the "Abramoff corruption scandal." The third mailer lauds Mitchell's legislative accomplishments and agenda, and states the following, among other things: "Harry Mitchell for Congress: Integrity Results For a Change." and "Harry Mitchell. Real Solutions, a New Direction."

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1 In addition, the complaint alleges that, since the mail pieces do not qualify for the volunteer  
2 materials exemption, the ADP violated the disclaimer requirements of the Act, 2 U.S.C. §441d and  
3 11 C.F.R. §110.11(b), by failing to include a statement whether or not the candidate or candidate's  
4 committee authorized the communications. According to the complaint, because the mail pieces do  
5 not satisfy the volunteer materials exemption, the mail pieces constitute a contribution to Harry  
6 Mitchell's principal campaign committee, Mitchell for Congress ("Mitchell Committee"), under  
7 2 U.S.C. § 441a or a party expenditure under § 441a(d), and should have been reported as such.  
8 Complainant further claims that funding for the mail pieces constitutes an excessive contribution to  
9 the Mitchell Committee.

10 In response, Respondents contend that the mail pieces qualify for the volunteer materials  
11 exemption under 2 U.S.C. §§ 431(8)(B)(ix) and (9)(B)(viii) and 11 C.F.R. §§ 100.87 and 100.147,  
12 and therefore comply with the disclaimer requirements of 11 C.F.R. § 110.11(e). Respondents do  
13 not specifically address the allegation that the costs of the mailing constitute an excessive  
14 contribution, but rather argue that if the mailings qualified for the volunteer materials exemption,  
15 the associated costs would be exempt from the definition of "contribution" or "expenditure." The  
16 Respondents also provided a sworn declaration from the ADP's Field Director, Nicholas Klonski,  
17 who recruited and supervised the volunteers, attesting to the facts that would purportedly satisfy the  
18 requirements of the volunteer exemption regulations, and provided several pictures of the volunteers  
19 handling the mailings.

20 **III. ANALYSIS**

21  
22 The main issue in this matter is whether the volunteer materials exemption applies to the  
23 ADP mailers, and if so, whether the disclaimers on the mailers meet the requirements for exempt

1 communications. The Act exempts from the definitions of “contribution” and “expenditure”  
2 payments by a state committee of a political party for the costs of campaign materials used in  
3 connection with volunteer activities on behalf of the party’s nominee. *See* 2 U.S.C.  
4 §§ 431(8)(B)(ix) and (9)(B)(viii); 11 C.F.R. §§ 100.87 and 100.147. Payments qualifying for the  
5 volunteer materials exemption are, therefore, not subject to the Act’s limits on a state party  
6 committee’s contributions or expenditures. *Id.*

7 **A. The Volunteer Materials Exemption**  
8

9 The complaint contends that the ADP mailers do not qualify for the volunteer materials  
10 exemption. In order to qualify for the exemption, a state or local committee must pay for the  
11 campaign materials under certain conditions, including: (a) the committee’s payment for the  
12 campaign materials is not for costs for “general public communication or political advertising,”  
13 which includes “direct mail”; (b) the portion of the payment allocable to a federal candidate must be  
14 paid with federal funds; (c) the committee’s payment must not be paid for from funds designated for  
15 a particular federal candidate by the donor; (d) campaign materials must be “distributed by  
16 volunteers and not by commercial or for-profit operations”; (e) the committee’s payment must have  
17 been disclosed as a disbursement; and (g) campaign materials must not be purchased either directly  
18 by a national committee or with funds donated by the national committee to the state committee.  
19 11 C.F.R. §§ 100.87(a)-(e), (g) and 100.147(a)-(e), (g).<sup>3</sup> For purposes of §§ 100.87(a) and  
20 100.147(a), “direct mail” is defined as “any mailing(s) by a commercial vendor or any mailing(s)  
21 made from commercial lists.” *Id.* As discussed below, the Commission has interpreted mailings  
22 with sufficient volunteer involvement to be eligible for the exemption, even if a commercial vendor

<sup>3</sup> 11 C.F.R. §§ 100.87(f) and 100.147(f) concern payments by state candidates and their campaign committees and are not relevant to the issues in these matters because there is no allegation that a state candidate paid for the mailers.

1 also plays some role. There is no available information indicating that the mailings were derived  
2 from a commercial list rather than from ADP's own voter list.

3 Based on the available information, it appears that the mailers have satisfied some of the  
4 regulatory requirements necessary to qualify for the volunteer materials exemption. First, a review  
5 of the ADP's disclosure reports appears to indicate that the ADP had sufficient federal funds at the  
6 time of the disbursements for the mailers at issue, thereby satisfying §§ 100.87(b) and 100.147(b).  
7 11 C.F.R. §§ 100.87(b) and 100.147(b). Second, as to §§ 100.87(c) and 100.147(c), the  
8 complainant and Respondents provide no information, and there is no other available information,  
9 that suggests that the ADP used funds designated for a particular candidate. 11 C.F.R. §§ 100.87(c)  
10 and 100.147(c). Third, with respect to §§ 100.87(e) and 100.147(e), the ADP's disclosure reports  
11 indicate that the disbursements for the mailers were disclosed to the Commission. *See* 11 C.F.R.  
12 §§ 100.87(e) and 100.147(e). Schedule B of ADP's 2006 October and Pre-General Reports show  
13 seven disbursements totaling \$112,594 to Mack/Crounse Group, LLC ("Mack/Crounse") between  
14 September 26 and October 11, 2006 for "Exempt Mail" that appears to be for the mailings at issue.  
15 Although the available information does not show the dates of dissemination for the mailers, it  
16 appears likely that these reported disbursement include the payments made for the mailers.<sup>4</sup>

17 However, with respect to the remaining requirements, two issues merit further discussion.  
18 First, although the complaint does not make any allegations that the mailers were paid for with  
19 national party committee funds, the ADP's disclosure reports indicate that it received approximately

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<sup>4</sup> Since the exact date of the production or distribution of the mailings is unknown at this time, the Commission considered disbursements within close proximity to the complaint that appeared to be related to the mailings. The final disbursement of \$10,886.63 to Mack/Crounse for "Exempt Mail" was on the date the complaint was received by the Commission, October 11, 2006. Based on the current record, it seems likely that this disbursement relates to the same mailings that are referenced in the complaint and response.

1 \$2,011,053 in national party committee funds between January and October 18, 2006, thus raising  
2 an issue as to whether the ADP paid for the mailers with funds from national party committees,  
3 which would not satisfy this element of the volunteer materials exemption. *See* 11 C.F.R.  
4 §§ 100.87(g) and 100.147(g). Second, the complaint focused on 11 C.F.R. §§ 100.87(d) and  
5 100.147(d), alleging that the volunteer involvement was insufficient due to the use of a commercial  
6 vendor evident on many aspects of the mailings.

7 **1. Payment of Mailers with National Party Committee Funds**

8 In order to qualify for the exemption, a state committee cannot pay for campaign materials  
9 with funds it received from a national party committee. *See* 11 C.F.R. §§ 100.87(g) and 100.147(g).  
10 There are no allegations in the complaint to suggest that the ADP used national party funds to pay  
11 for the mailers, and the ADP does not address this point. However, the ADP's disclosure reports  
12 show that it received approximately \$2,011,053 from national party committees between January  
13 and October 18, 2006 and that it spent approximately \$112,594 on the mailers between September  
14 26 and October 3, 2006. However, it appears that ADP had approximately \$2,006,690 in non-  
15 national party funds that it could have spent on the mailers at issue. Therefore, it appears that the  
16 ADP has satisfied the requirements of §§ 100.87(g) and 100.147(g) in that it had sufficient federal  
17 funds from sources other than national party committees to pay for the mailers.

18 **2. Distribution by Volunteers**

19 The complaint contends that the mailers do not satisfy the volunteer materials exemption  
20 requirements of 11 C.F.R. §§ 100.87(d) and 100.147(d) because the "attached commercially  
21 produced mail pieces clearly bear commercially printed labels and postage stamps." Respondents  
22 appear to acknowledge that the address labels and postage stamps were commercially imprinted but

1 pointed out that modern technology has changed the way mailers have been traditionally produced  
2 and distributed by volunteers, so that pre-printed addressing has replaced labeling and the pre-  
3 printed bulk postage stamp has replaced hand stamping. Respondents also contends that the  
4 Commission has not provided any specific guidance on exactly how much volunteer activity is  
5 required to satisfy the volunteer exemption and that the ADP's volunteers were sufficiently  
6 involved in the mailings to satisfy the Commission's requirements for the exemption. Finally,  
7 Respondents opined that the Commission should "take a more modern approach in analyzing  
8 volunteer activity" and that "most mail houses and post offices prohibit private individuals from  
9 transporting bulk mail to their facilities for legal and insurance reasons."

10 In addition, Respondents have submitted a sworn declaration from Mr. Klonski, the ADP's  
11 Field Director, who recruited and supervised the volunteers. Mr. Klonski states that volunteers fed  
12 the pre-printed mail into an addressing machine that laser printed the addresses onto each mail  
13 piece. As each piece came off the machines, volunteers sorted and bundled it into batches using  
14 rubber bands and placed them into bags by zip code. Mr. Klonski further states that the volunteers  
15 then placed the proper zip code labels on the bags and tagged them as priority political mail. The  
16 volunteers placed the bags into crates for transport to the Post Office.<sup>5</sup> Respondents assert, and  
17 Mr. Klonski concurs, that though the volunteers were available to transport the mail pieces to the  
18 Post Office, representatives of Tri-City Mailing Services, Inc. ("TCMS"), the commercial vendor at  
19 whose facilities the volunteers processed the mailings, told the volunteers that they could not to do

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<sup>5</sup> Respondents provided photographs of volunteers who appear to be addressing, sorting, bundling, tagging, bagging, and loading mailers into the back of a delivery truck. Only the "Mitchell for Congress" mailer appears discernible from the photographs.

1 so themselves due to insurance and legal requirements; thus, TCMS transported the mailings to the  
2 Post Office.

3 Although the postage and labels were printed commercially, that task is likely to be  
4 completed by printers more often as technology improves, and does not necessarily minimize the  
5 work done in the other tasks related to “distribution” – separation and delivery. Respondents’  
6 response, as well as the sworn declaration, provides specifics of the activities performed by the  
7 volunteers, including “sorting by zip code,” an activity that was performed in many of the previous  
8 matters in which the Commission granted the exemption.<sup>6</sup> *See e g.*, MUR 2377 (exemption applied  
9 where volunteers unpacked, labeled, sorted, bundled, and delivered mailers to the Post Office).

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14 <sup>7</sup> In those recent matters, as in this matter, volunteers bundled, sorted, bagged,  
15 and tagged the mailers, but did not transport the mailers to the Post Office. Nonetheless, the  
16 Commission concluded that the amount of volunteer activity involved constitute substantial  
17 volunteer involvement in distribution, sufficient to satisfy the requirements of sections 100.87(d)

<sup>6</sup> While sorting by zip code has been performed in most cases where the Commission has applied the exemption, it has not been categorically required *See e g* MUR 4851 (Michigan Republicans) (exemption applied where volunteers affixed postal indicia and labels and delivered to the Post Office, but apparently did not sort the mailers)

<sup>7</sup> In previous matters, the Commission has considered the totality of volunteer involvement in evaluating whether a mailer was “distributed” by volunteers or was commercial “direct mail” and has not categorically required any specific activity For example, while sorting by zip code has been performed in most cases where the Commission has applied the exemption, it has not been categorically required *See e g* MUR 4851 (Michigan Republicans) (exemption applied where volunteers affixed postal indicia and labels and delivered to the Post Office, but apparently did not sort the mailers) In addition, as in MUR 4471 (Montana State Democratic Central Committee), the fact that a commercial vendor performed some tasks, such as printing and folding, has not, by itself disqualified a mailing where volunteers were otherwise substantially involved



1 and 100.147(d).<sup>8</sup> Therefore, consistent with the Commission's recent conclusions in the similar  
2 matters discussed above, the Commission finds no reason to believe that the Arizona Democratic  
3 Party a/k/a Arizona State Democratic Central Executive Committee and Rick McGuire, in his  
4 official capacity as treasurer, violated 2 U.S.C. § 441a by making excessive in-kind contributions to,  
5 or party expenditures on behalf of, Harry Mitchell and the Mitchell Committee; and § 434(b) by  
6 failing to properly disclose contributions and party expenditures. The Commission also finds no  
7 reason to believe that Harry Mitchell for Congress and John Bebbeling, in his official capacity as  
8 treasurer, violated 2 U.S.C. § 441a by receiving excessive in-kind contributions and 2 U.S.C.  
9 § 434(b) for failure to disclose such contributions.<sup>9</sup>

10 **B. Disclaimer Requirements**

11  
12 The complaint alleges that the mailers at issue did not comply with the disclaimer  
13 requirements because they did not state whether any candidate or candidate committee authorized  
14 the communications. The ADP contends that the mailers complied with the disclaimer  
15 requirements for "exempt mail" and did not need to include an authorization statement.

16 Under the Act, when a political committee distributes a mass mailing or conducts other  
17 "public political advertising," it must include an appropriate disclaimer. *See* 2 U.S.C. § 441d;  
18 11 C.F.R. § 110.11. A "mass mailing" is defined as a "mailing . . . of more than 500 pieces of mail  
19 within any 30-day period." 2 U.S.C. § 431(23). Though there is no direct information regarding the

<sup>9</sup> Since the mailers qualify for the volunteer materials exemption, it is unnecessary to determine whether the mailers were coordinated with the Mitchell Committee

1 volume of the mailings at issue, the ADP appears to acknowledge that a disclaimer was required by  
2 including one on each mailer, and it does not challenge the application of the disclaimer  
3 requirements in its response. In addition, references in the ADP's response to placing the mail into  
4 "bags" that were then placed "on crates to be placed in a truck" for transport to the Post Office and  
5 the substantial cost associated with the mailings indicate that the mailers constituted a "mass  
6 mailing" under 11 C.F.R. §§ 100.27 and, therefore, public communications under 2 U.S.C.  
7 § 431(22) and (23) and 11 C.F.R. §§ 100.26. Thus, it appears that the mailers were required to have  
8 appropriate disclaimers.

9 Mailers that qualify for the volunteer materials exemption are subject to the disclaimer  
10 requirements for exempt materials under 11 C.F.R. § 110.11(e). Under section 110.11(e), an  
11 exempt mailing must comply with the general disclaimer requirements of sections 110.11(a), (b),  
12 (c)(1) and (c)(2), but "the disclaimer does not need to state whether the communication is  
13 authorized" by any candidate or authorized committee. 11 C.F.R. § 110.11(e). Therefore, as  
14 exempt mail, the ADP mailers were not required to include a candidate authorization statement.  
15 However, the mailers were required to state who paid for them, and if they were not authorized by a  
16 federal candidate or committee, the disclaimer must also include "the full name and permanent  
17 street address, telephone number, or World Wide Web address" of the party that paid for the  
18 mailers. 2 U.S.C. § 441d(a)(3); 11 C.F.R. § 110.11(b)(3). The disclaimer must be clear and  
19 conspicuous, of sufficient size, contained in a printed box set-apart from the other contents of the  
20 communication, and printed with a reasonable degree of color contrast. 2 U.S.C. § 441d(c);  
21 11 C.F.R. § 110.11(c)(1)–(2).

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1 All of the mailers attached to the complaint include a disclaimer stating "Paid for by the  
2 Arizona Democratic Party" in a separated disclaimer box. The mailers also showed the ADP's  
3 street address, but not within the disclaimer box. The ADP's street address appeared in the return  
4 address section of the mailers, above the disclaimer box. The disclaimer does not include any  
5 language as to authorization or non-authorization of the communication. The typeface of the  
6 disclaimers is sufficiently large and the color contrast acceptable (black type on white background).

7 Though, as exempt mail, the ADP mailers did not need to include a statement as to whether  
8 they were authorized by a candidate or candidate committee, the mailers are required to include a  
9 permanent street address, phone number, or web address in the separated disclaimer box, if the  
10 mailers were not authorized by the Mitchell Committee. *Compare* 2 U.S.C. § 441d(a)(2) and  
11 11 C.F.R. § 110.11(b)(2) *with* 2 U.S.C. § 441d(a)(3) and 11 C.F.R. § 110.11(b)(3). In contrast, if  
12 the mailers were authorized, then the ADP disclaimers would have complied with section 110.11(e).

13 As previously mentioned, the mailers showed the ADP's street address close to the  
14 disclaimer box, but the address was not in the box. Therefore, if the mailers were unauthorized,  
15 they would not be fully compliant with the disclaimer requirements. Neither the ADP nor the  
16 Mitchell Committee addressed the authorization of the mailers in its response, and the available  
17 information does not shed any light on the issue.

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<sup>10</sup> Accordingly, the

- 1 Commission exercises its prosecutorial discretion and dismisses the alleged violation of 2 U.S.C.
- 2 § 441d for failing to include the appropriate disclaimer on the mailers.

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